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In the Supreme Court of the United States

OCTOBER TERM, 1951

No. 271

MOORE-McCORMACK LINES, INC., PETITIONER

v.

CECIL E. FOLTZ, JR.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The Solicitor General, on behalf of Moore-McCormack Lines, Inc., a general agent of the former War Shipping Administration,[1] prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in the above-entitled case on May 28, 1951.

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[1] The Solicitor General appears for petitioner because, in accordance with the wartime general agency agreement between petitioner and the War Shipping Administration, the United States is required to indemnify and defend its agents against any litigation arising out of the performance of the agent's official duties. See W.S.A. Form G.A.A. 4-4-42, 46 C.F.R. Cum. Supp. sec. 306.44.

OPINIONS BELOW

The order of the United States District Court for the Southern District of New York (R. 47-48) is not reported. The opinion of the Court of Appeals (R. 53-57) is reported at 189 F. 2d 537.

JURISDICTION

The judgment of the Court of Appeals was entered on May 28, 1951 (R. 57). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Respondent's appointment to a federal post in Korea was conditioned by statute on an investigation as to his "loyalty and security by the Federal Bureau of Investigation." In the course of this investigation petitioner communicated to the F.B.I., upon its request, certain information concerning respondent.

The question presented is whether such a communication to the F.B.I. is absolutely privileged, so that it cannot support an action for damages.

STATUTE INVOLVED

Section 110(c) of the Foreign Assistance Act of 1948 (62 Stat. 137, 143, 22 U.S.C., Supp. IV, 1508(c)) provides:

> (c) No citizen or resident of the United States may be employed, or if already employed, may be assigned to duties by the Secretary of State or the Administrator under this title for a period to exceed three months unless such individual has been investigated as to loyalty and security by the Fed-

eral Bureau of Investigation and a report thereon has been made to the Secretary of State and the Administrator, and until the Secretary of State or the Administrator has certified in writing (and filed copies thereof with the Senate Committee on Foreign Relations and the House Committee on Foreign Affairs) that, after full consideration of such report, he believes such individual is loyal to the United States, its Constitution, and form of government, and is not now and has never been a member of any organization advocating contrary views. This subsection shall not apply in the case of any officer appointed by the President by and with the advice and consent of the Senate.

STATEMENT

This action for libel and slander was brought by respondent Foltz against Moore McCormack Lines, Inc., alleging that it had maliciously given to the F.B.I. false and derogatory statements concerning him which caused his discharge from federal employment.

In April 1949, respondent was appointed to a position in the Economic Cooperation Administration's special mission at Pusan, Korea (R. 38). This appointment was "subject to the condition of a favorable report of the Federal Bureau of Investigation after an investigation by that agency in accordance" with Section 110(c) of the Foreign Assistance Act of 1948, *supra* (R. 39.) While conducting that investigation, the F.B.I. sought

information from petitioner concerning Foltz's employment record between 1939 and 1946 (R. 39).

Foltz's complaint, setting forth the facts summarized above, was filed in the United States District Court for the Southern District of New York on June 9, 1950 (R. 1, 38-42). The complaint also alleged (1) that petitioner answered the F.B.I. request for information by maliciously publishing to the F.B.I. "false, misleading and defamatory statements" concerning respondent, and (2) that this publication "was effected by the furnishing of the personal file" by petitioner to the F.B.I. and by "oral statements made by one Captain Edward Barrett, an employee acting for and on behalf of [petitioner], as to matters not contained in said personal file" (R. 40). The complaint further asserted that the F.B.I. included such defamatory matter in reporting on its investigation of respondent and that on October 4, 1949, he was discharged because the F.B.I. report "was unsatisfactory" (R. 41). For alleged injuries thereby resulting to his name and reputation, respondent demanded damages in the sum of $350,000 (R. 41-42).

The United States, assuming the defense of the suit,[2] moved to dismiss on the ground that the complaint failed to state a claim upon which relief could be granted (R. 45). The district court granted this motion because (1) the statements made to the F.B.I. in the course of the investiga-

[2] See footnote 1, *supra*, p. 1.

tion of respondent were privileged and (2) the complaint failed to allege that Captain Barrett's oral statements were made by him "within the scope of his authority" as an employee of petitioner (R. 48).

On appeal, the court below reversed. It agreed that the complaint was defective in omitting the "scope of authority" allegation as to Captain Barrett's statements (R. 54). But it viewed that defect as "insufficient ground for dismissing the entire complaint since it does not touch that part of it which alleges the publication of the file record to the F.B.I." (R. 54). And, disagreeing with the district court on the more significant question of privilege, it held that petitioner's statements to the F.B.I. were only qualifiedly privileged and hence actionable if motivated by malice (R. 56).[3] The order of the district court was accordingly reversed and the cause remanded (R. 57).

REASONS FOR GRANTING THE WRIT

The court below has held that compliance with an F.B.I. demand for information relevant to the loyalty and security of a federal employee exposes the informer to a civil action whenever it is alleged that the information is false and that improper motives prompted him to supply that information.

[3] The court below considered it unnecessary to determine whether the question of privilege was governed by New York law or Federal law, since it held that under both only a qualified privilege exists. If certiorari is granted, we will urge that effective Federal law enforcement requires that this question of privilege be governed by a uniform Federal rule.

The decision, if allowed to stand, may not only disrupt administration of the government employee security and loyalty programs, but may seriously hamper many other phases of federal law enforcement. Even if correct, a decision entailing such serious and far reaching consequences should, we believe, be reviewed by this Court. The need for reviewing the decision here is underscored by substantial doubts as to its correctness.

1. The Director of the F.B.I. has advised the Attorney General that "the effectiveness of the F.B.I. will suffer irreparable harm if this decision is permitted to stand. The far-reaching implications of this decision are obvious. It means that every person who furnishes adverse information to the F.B.I. subjects himself to the possibility of a civil suit." The Director also pointed out that, "Through speeches, publications and other media the public has been encouraged to make no attempt at evaluating or investigating suspicious activity, nor to engage in rumor spreading, but, instead, to report its suspicions to the F.B.I. in order that trained investigators may determine the facts without injury to innocent persons and without jeopardy to a successful case. The public will hardly heed such advice in the face of a decision, which, to the laymen, will mean that if he furnishes derogatory information to the F.B.I. he might be haled into court to answer a civil suit."

2. It has long been settled that a public official is absolutely privileged from civil liability with

respect to allegedly libelous communications in the course of his official duties. *Spalding* v. *Vilas,* 161 U.S. 483. Strong considerations of public policy justify this immunity rule. Apprehension that his official conduct may subject him to a civil action for damages impinges on "the perfect freedom which ought to exist in discharge of public duty * * * and often to the detriment of the public service." *DeArnaud* v. *Ainsworth,* 24 App. D.C. 167, 178; *Cooper* v. *O'Connor,* 99 F. 2d 135, 141-142 (C.A. D.C.), certiorari denied, 305 U.S. 643; *Gregoire* v. *Biddle,* 177 F. 2d 579 (C.A. 2), certiorari denied, 339 U.S. 949.

There can be no doubt that in view of these considerations communications between governmental officials are absolutely privileged and cannot be the subject of an action for libel. See *Powers* v. *Vaughan,* 312 Mich. 297. Nor can an official be deprived of that absolute privilege and exposed to personal liability because the communication was addressed to the general public rather than another official. *Glass* v. *Ickes,* 117 F. 2d 273, 277 (C.A. D.C.), certiorari denied, 311 U.S. 718; *Mellon* v. *Brewer,* 18 F. 2d 168, certiorari denied, 275 U.S. 530.[4] In both situations, absolute immunity

[4] The *Vilas* case itself involved a communication by the Postmaster General to some 4,000 persons claiming back pay under a federal statute. Some of these persons were still post office employees while others were not. Hence, the communication could not be treated as one between officials, but rather as one between an official and the public claiming under the federal statute. See *Glass* v. *Ickes,* 117 F. 2d 273, 277, note 7.

is predicated on the need of avoiding any interference with communications appropriate to the free and fearless discharge of official duties. *Yaselli* v. *Goff*, 12 F. 2d 396, 406, affirTed, 275 U.S. 503. The court below, we submit, erred in refusing to invoke the identical considerations to afford absolute immunity in the performance of a public duty by a member of the public addressing a communication to a government officer in response to the latter's official request.[5] Denial of that absolute privilege will, by subjecting the informer to the burden of a trial and the fear of being held to respond in damages, close to the F.B.I. and other government investigative agencies customary sources of information. See *Simpson* v. *Oil Transfer Corp.*, 75 F. Supp. 819, 821 (N.D. N.Y.); *Krumin* v. *Bruknes*, 255 Ill. App. 503; *Alagna* v. *New York & Cuba Mail S.S. Co.*, 155 Misc. 796 (N.Y.). This result can be avoided only by affording absolute immunity to all three types of communications—that is, those from one official to another, those from an official to the public, and those from the public to an official. Contrary to the view of the court below, we believe that the rule of *White* v. *Nicholls*, 3 How. 266, was aban-

[5] This Court has already noted that it is the "duty" of every citizen "to communicate to the executive officers any information which he has of the commission of an offence against those laws; and such information, given by a private citizen, is a privileged and confidential communication, for which no action of libel or slander will lie." *In re Quarles & Butler*, 158 U.S. 532, 535-536; see *Vogel* v. *Gruaz*, 110 U.S. 311; *Wilson* v. *United States*, 59 F. 2d 390, 392 (C.A. 3).

doned in *In re Quarles & Butler,* 158 U.S. 532, 535-536. If not, we urge that it be reconsidered in the light of the law enforcement problems referred to above.

Nor can the denial of an absolute privilege to communications from the public to the F.B.I. be justified on the ground suggested by the court below that it is "desirable to allow some restraint in order to reduce the waste of requiring the F.B.I. to investigate * * * false charges maliciously made." (R. 57). All the necessary restraint is, we submit, furnished by the federal statutes which make the submission of false reports to the Government a criminal offense punishable by as much as five years imprisonment and a $10,000 fine. 18 U.S.C. 1001; see also 18 U.S.C. 2073. Moreover, the F.B.I. much prefers to do its own screening. See *supra,* p. 6.

CONCLUSION

For the reasons stated, it is respectfully submitted that this petition should be granted.

PHILIP B. PERLMAN,
Solicitor General.

AUGUST 1951.

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